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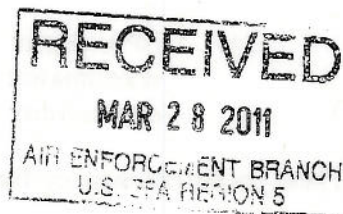
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March 25, 2011

Mr. George Czerniak
Chief, Air Enforcement and
Compliance Assurance Branch
U.S. Environmental Protection Agency
Region 5, Mail Code: AE-17J
77 West Jackson Boulevard
Chicago, Illinois 60604-3507



Re: Request for Applicability Determination for Secondary Nonferrous Metals NESHAP

Dear Mr. Czerniak:

On behalf of Mueller Brass Co. ("Mueller Brass"), as agreed during our meeting with Region 5 on February 28, we hereby seek a determination regarding the applicability of the National Emission Standards for Hazardous Air Pollutants for Secondary Nonferrous Metals Processing Area Sources, 40 C.F.R. Part 63, Subpart TTTTTT ("Secondary Nonferrous Metals Processing NESHAP"). We are submitting this request in light of the Finding of Violation ("FOV") issued by Region 5 on January 28, 2011, in which EPA contends that Mueller Brass is a "brass or bronze ingot making facility" subject to the NESHAP.

During our meeting, Region 5 agreed to stay any further enforcement activity pending resolution of this applicability determination request. We also agreed at the meeting to submit the applicability determination request to Region 5 by March 25, 2011, and that Region 5 will send the request to EPA Headquarters for resolution. We look forward to resolving this matter expeditiously.

For a number of reasons, the NESHAP does not apply to Mueller Brass operations or to other similarly situated facilities in the brass and bronze mill industry:

- (1) On its face and as developed, the NESHAP was intended to apply to brass and bronze "ingot makers," an industry category that does not include brass mills such as Mueller Brass;
- (2) Brass and bronze ingot making is a unique and distinct industry sector from brass mills, with different SIC codes, products, processes and raw materials, as EPA has recognized in other rulemaking contexts;
- (3) Brass mills at no point were included in the source category listing or the NESHAP rulemaking process or record; and
- (4) EPA cannot expand the scope of the NESHAP to cover an industry sector not encompassed within the rulemaking record or given fair notice of the potential applicability of the rule.

These points are detailed further below, following a description of Mueller Brass operations.

I. DESCRIPTION OF MUELLER BRASS OPERATIONS

Mueller Brass is a brass mill that melts a combination of ingots and high quality scrap as the charge materials for its operations. The majority of the scrap utilized by Mueller Brass is brass turnings (post-industrial "new scrap") returned by customers after machining or otherwise forming the brass products provided by Mueller as well as process scrap generated during manufacturing.¹ Mueller Brass also purchases and uses lead ingot and zinc ingot, as well as small amounts of high grade post-consumer copper scrap. From these ingot and scrap raw materials, Mueller Brass produces high quality cold drawn extruded brass products such as rod, bar, and special shapes. Mueller Brass is not and never has been a brass and bronze ingot manufacturer.

Ingot manufacturing generally is characterized by the refining of lower grade scrap containing impurities and other elements with fluxes to produce ingots that are intended for remelting.² In contrast, brass mills such as Mueller Brass use high quality (processed post-industrial) scrap and ingots to cast chemically finalized billets that are then extruded and otherwise finished to create final brass products that are not remelted. The image below dramatizes the difference between basic ingot forms ("ingot bar") and the more final cast billets and other products that Mueller produces.³ The key distinction is that ingot makers refine lower grade materials to remove impurities and produce an intermediate product—an ingot—that is

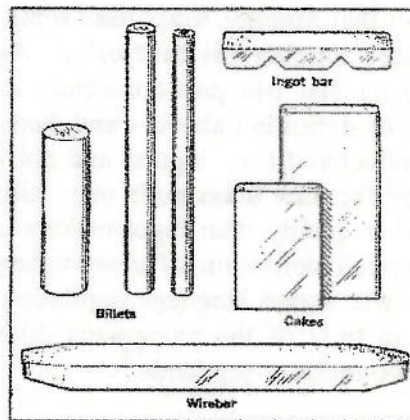
¹ Post-industrial "new scrap" is distinct from post-consumer "old scrap."

² See Exhibit A, ASTM specification for ingot manufacturing, noting that "ingot is an intermediate product intended for remelting by the purchaser"

³ Mueller does not produce the cakes or wirebar identified in the picture.

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then remelted by others to produce a finished product. Mueller Brass uses high quality raw materials to produce an alloy of specific chemical composition that is cast into a final product—a billet—that is then cold drawn or extruded, but not further refined or melted. The descriptive term “ingot bar” in the industry is understood to be an entirely different product than an extruded rod or bar produced by the brass mill industry. Ingot bars appear as shown below and generally weigh 20-35 pounds. Extruded bars are produced in diameters from ¼ inch to 4 ½ inch with a standard length of 12 feet. Billets produced by Mueller weigh between 1400 and 2800 pounds.



As discussed below, ingot making and brass rod or wire production are widely recognized in the industry as separate and distinct industry sectors. EPA also has consistently treated these sectors as distinct for purposes of environmental regulation, due largely to the recognition that ingot makers must refine lower quality scrap to remove impurities, while brass mills melt higher grade raw materials to adjust chemistry.

II. THE NESHAP IS NOT APPLICABLE TO MUELLER BRASS OPERATIONS

A. According To The Plain Language Of The Rule, The NESHAP Applies To Brass And Bronze “Ingot Makers,” A Category That Does Not Include Brass Mills

The plain language of the rule precludes application of the NESHAP to brass mills, including Mueller Brass. The Secondary Nonferrous Metals Processing NESHAP defines a secondary nonferrous metals processing facility as follows:

Secondary nonferrous metals processing facility means a brass and bronze ingot making, secondary magnesium processing, or secondary zinc processing plant that uses furnace melting operations to melt post-consumer nonferrous metal scrap to make products including bars, ingots, blocks, or metal powders.
(underline added)

By the terms of this regulatory language, there are four applicability criteria: the facility must be (1) a brass and bronze ingot making plant; (2) that uses furnace melting operations; (3) to melt post-consumer scrap; (4) to make products. As detailed above, brass mills do not make ingots, but, rather, operate farther downstream and make products such as rod, bar, sheet, strip, and wire. Instead of making ingots, Mueller Brass uses ingots to manufacture these more finished products. Accordingly, brass mills, including Mueller Brass, fall outside the scope of the EPA definition of a secondary nonferrous metals processing facility.

Moreover, the fact that Mueller Brass uses some (generally less than 10%) post-consumer scrap as a feedstock does not alter this conclusion. As written, the rule clearly applies to brass and bronze ingot makers that use post-consumer scrap, not any brass and bronze producer that uses such scrap. The definition above – and, hence, applicability of the NESHAP – turns on the end product manufactured (*i.e.*, ingots) and not solely the use of post-consumer scrap. Thus, notwithstanding the fact that brass mills may utilize post-consumer scrap (though significantly less and of far higher quality than ingot makers use), this alone would not bring brass mills under the rule's explicit definition of a secondary nonferrous metals processing facility.⁴ EPA's choice of narrowly drawn language regulating only post-consumer scrap used by ingot makers is reasonable in light of the recognized differences in feedstock purity and emissions profiles between the two industry segments.⁵

Similarly, the fact that a brass mill makes products such as bar (arguably not the same bars that are referenced as examples of products that facilities otherwise covered by the rule may produce), does not subject the facility to the NESHAP unless they are also a "brass and bronze ingot making plant." Had EPA intended to regulate all secondary brass and bronze processing, it could easily have stated such an intent explicitly, as it did with regard to secondary magnesium processing and secondary zinc processing in the same applicability provision.

"Brass and bronze ingot making" is a term of art that has a specific meaning within the secondary copper industry. As explained further below, EPA has recognized this

⁴ The Secondary Nonferrous Metals NESHAP's regulation of *ingot making* facilities that use furnace operations to melt post-consumer scrap is readily distinguishable from more broadly applicable rules like the Secondary Aluminum NESHAP, which by its terms regulates "any establishment" using post consumer aluminum scrap (or other charge materials) in furnace operations. When EPA has wanted rule applicability to turn on scrap usage alone, it has expressly stated so. See Exhibit B, Letter from George Czerniak to James Vandenberg regarding melting and alloying of aluminum scrap in a furnace operation (January 17, 2003) (Applicability Determination Index Control Number MD30060)

⁵ See Exhibit C, *Current Status of Secondary Copper Production in the United States*, pp 7-10, (March 31, 2006) (Included in secondary smelting NESHAP docket, EPA-HQ-OAR-2006-0510-0008)

distinction in multiple contexts, including during the rulemaking process for the Subpart TTTT NESHAP.⁶

The rule language is absolutely clear that the NESHAP only applies to brass and bronze ingot making facilities. Mueller Brass does not manufacture ingots and, therefore, is not subject to the rule.

B. Brass And Bronze Ingot Making Is A Distinct Industry Sector From Brass Mills, As EPA Has Recognized In Other Contexts

The secondary copper industry, and EPA itself, has long recognized the significant differences between brass and bronze ingot makers and other segments of the secondary copper industry, including brass mills. This is a distinction with commercial and regulatory importance.

The secondary copper industry is widely understood to be comprised of at least three distinct segments: secondary smelting, ingot making, and remelting.⁷ EPA background materials included in NESHAP rulemakings have further differentiated between numerous sectors in the secondary copper production industry, including secondary smelters, ingot manufacturers, copper refiners, foundries, wire-rod mills, chemical plants, and brass and bronze mills.⁸ These industry segments differ in several elementary respects:

- (1) Feedstock: Ingot makers utilize lower quality scrap materials, while brass mills (remelters) utilize ingots and high quality scrap.⁹
- (2) Process: Ingot makers must utilize processes to purify the lower quality scrap feedstocks to produce a higher quality material (ingot), while brass mills conduct little purification due to the higher quality feedstock material, including ingots. In addition, ingot makers form ingots by pouring the molten metal into molds for remelting, while brass mills directly cast into the desired shapes (such as billets for further mechanical processing into rods and bars).

⁶ See e.g., EPA, *Supplemental Guidance for Brass and Bronze Ingot Makers and Other Secondary Copper Remelting Processors* (emphasis added) (distinguishing ingot producers from remelters) (docket # EPA-HQ-OAR-2006-0940-0023)

⁷ See Exhibit D, Guidance for Reporting Toxic Chemicals within the Dioxin and Dioxin-like Compounds Category, pp 39-40 (December 2000), available at http://www.epa.gov/tri/guide_docs/pdf/2000/TRIdioxinguidance.pdf

⁸ See Exhibit C, supra note 5 at 7-10

⁹ *Id.*

- (3) Product: Ingot makers produce ingots. Brass mills utilize ingots to produce intermediate products (e.g., billets) and final products (e.g., rod, bar, sheet, strip, wire).

The recognized difference between ingot makers and brass mills is clear from EPA's background materials from a related rulemaking, which note that ingot makers use "old scrap and copper alloy scrap" and "must conduct some purification."¹⁰ Conversely, EPA notes that brass and bronze mills use "new scrap and some high grade old scrap" and perform "no substantial purification."¹¹ This distinction between scrap feeds is critical, as EPA stated in the Secondary Nonferrous Metals Processing NESHAP proposal that "PM emissions are *totally dependent* upon the incoming scrap metal."¹²

These process, product, and feedstock distinctions are reflected in the Standard Industrial Classification ("SIC") codes EPA utilized in developing the rule.¹³ The rulemaking analysis was focused on SIC code 3341,¹⁴ which covers secondary smelters, brass and bronze ingot makers, and other facilities that refine lesser quality scrap and produce ingots from other nonferrous metals. In contrast, EPA did not include in its analysis facilities within SIC code 3351, the relevant code for the brass mill industry, which covers integrated facilities engaged in recovering (i.e. melting) copper from scrap and rolling, drawing, and/or extruding shapes.¹⁵

¹⁰ *Id.* at 3 (defining "old scrap")

¹¹ *Id.* at 3 (defining "new scrap"), at 9 (defining specific segments of secondary copper industry), and at 8 (showing new and old scrap use by various segments of the copper industry). *See also*, Exhibit D (differentiating secondary smelters and ingot makers from remelters (a broader category that includes not only brass mills, but also wire rod mills and foundries) and noting that "remelting facilities do not conduct any substantial purification of the incoming feeds. These facilities typically just melt the charge and cast or extrude a product. The feeds to a remelter are generally alloy material of approximately the desired composition of the product.")

¹² *See* EPA, *National Emission Standards for Hazardous Air Pollutants for Area Sources: Clay Ceramics Manufacturing, Glass Manufacturing, and Secondary Nonferrous Metals Processing*, proposed rule (emphasis added), 72 Fed. Reg. 53838, 53847 (September 27, 2007).

¹³ *See* discussion in Section II.C below for details on EPA's use of SIC codes in the NESHAP development process.

¹⁴ *See* Exhibit E, definition of SIC 3341, defining SIC 3341 as including facilities "primarily engaged in recovering nonferrous metals and alloys from new and used scrap and dross or in producing alloys from purchased refined metals."

¹⁵ *See* Exhibit F, definition of SIC 3351, defining SIC 3351 as including facilities "primarily engaged in rolling, drawing, and extruding, copper, brass, bronze, and other copper base alloy basic shapes, such as plate, sheet, strip, bar and tubing..."; *See also*, Exhibit G, definition of NAICS code 331421, demonstrating that SIC 3351 included facilities that were also engaged in melting operations. NAICS 331421 applies not only to facilities that merely roll, draw, and extrude, but also to facilities that recover copper from scrap and roll, draw, and/or extrude shapes

Thus, the SIC code system that EPA relied upon in the rulemaking process distinguishes the melting of scrap and casting of ingots alone from integrated melting and rolling/extruding operations that manufacture more complex shapes. It also clearly demonstrates that all brass and bronze melting operations were not classified under SIC 3341. For that reason, Mueller Brass and other brass mills properly identified their facilities in 1990 TRI reports as within SIC code 3351.¹⁶

Given the distinctions among different sectors of the secondary copper industry, EPA appropriately has addressed these industry sectors separately in a variety of rulemaking and other regulatory activities. Each of EPA's rules relating to secondary copper specifically defines the segment of the industry the agency is seeking to regulate.¹⁷ Read together, these rules clearly distinguish ingot making operations from other segments of the industry, including brass mills.

Significantly, the Subpart M New Source Performance Standards ("NSPS") demonstrate EPA's knowledge of the secondary copper industry and its intent regarding the use of the term "ingot making." As originally promulgated, Subpart M applied only to "secondary brass and bronze ingot production plants."¹⁸ EPA later revised the NSPS and changed the name to "secondary brass and bronze production plants" to clarify that processes that continuously cast rod rather than batch cast ingot also were covered by the rule.¹⁹ This change clearly demonstrates EPA's express recognition that ingot making is understood to be a separate segment of the secondary copper industry and distinct from other brass or bronze processing operations.²⁰

in integrated mills; *See also*, Exhibit H, U.S. Census "Bridge Between NAICS and SIC" document (showing that all facilities in SIC 3351 were subsumed into NAICS 331421)

¹⁶ *See* Exhibit I, Mueller Brass 1990 TRI Report

¹⁷ *See* National Emission Standards for Hazardous Air Pollutants for Area Sources: Polyvinyl Chloride and Copolymers Production, Primary Copper Smelting, Secondary Copper Smelting, and Primary Nonferrous Metals, 72 Fed. Reg. 2930 (January 23, 2007); National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Aluminum, Copper, and other Nonferrous Foundries, 74 Fed. Reg. 30366 (June 25, 2009)

¹⁸ *See* 39 Fed. Reg. 9308 (March 8, 1974).

¹⁹ *See* 49 Fed. Reg. 43616 (October 30, 1984).

²⁰ *See* Exhibit J, Memorandum from Lee Beck to James Berry documenting telephone conversation with Oklahoma state official (April 10, 1974) (Applicability Determination Index Control Number M001). There, EPA found that the Subpart M NSPS did not apply to a facility that used ingots to produce billets from which copper tubing was made, stating that the facility "appears to be more a foundry than a secondary brass or bronze ingot production plant." Like the NSPS applicable at the time, the Secondary Nonferrous Metals NESHAP also applies by its terms only to ingot-making. Thus, EPA's reasoning regarding the NSPS applicability should apply with equal force to the Secondary Nonferrous Metals NESHAP

Consistent with these rules, EPA specifically opted to cover only one segment of the secondary copper industry – “brass and bronze *ingot making*” – in the Secondary Nonferrous Metals Processing NESHAP. EPA’s specific inclusion of only ingot makers in the NESHAP must be given meaning, especially in light of the fact that the agency explicitly differentiated between ingot makers and other industry segments in companion NESHAPs, the Subpart M NSPS, and other regulatory documents.²¹ These rules and background documents demonstrate that EPA technical staff were well aware of the diversity of the secondary copper industry and yet specifically did not target brass mills in any of the rules. The reason for the exclusion of brass mills from the NESHAPs is simple – emissions from brass mills in the 1990 emissions inventory were comparatively small and thus not part of any source category EPA listed for the development of area source rules under Clean Air Act (“CAA”) Sections 112(c)(3) and 112(k), as discussed further below.

C. **Brass Mills Are Were Not Included in the Source Category Listing and the Rulemaking Record**

1. **Brass mills (SIC code 3351) are not included within the listing of source categories for NESHAP development**

EPA was required by CAA Sections 112(k)(3)(B)(ii) and 112(c)(3) to identify and list source categories accounting for 90 percent or more of 30 identified hazardous air pollutants.²² EPA was then required to ensure that these listed source categories were subject to emissions standards under Section 112(d). Section 112(d)(1) states that “the Administrator shall promulgate regulations establishing emissions standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section....”²³

In ranking source categories for listing determinations under the agency’s Integrated Urban Air Toxics Strategy, EPA looked to 1990 TRI emissions data from a variety of

²¹ In addition to differentiating between ingot makers and other secondary copper producers in various NESHAPs, the Subpart M NSPS, and the dioxin guidance, EPA also explicitly differentiated between brass mills, brass foundries, and brass ingot makers in its rulemaking on excluding zinc-containing hazardous secondary materials from the definition of solid waste. See Exhibit K, Economic Analysis of Regulatory Modifications to the Definition of Solid Waste for Zinc-Containing Hazardous Waste-Derived Fertilizers, Notice of Proposed Rulemaking, Final Report, p. 5-9 (November 2000) (Docket # EPA-HQ-RCRA-2000-0054-0634) (noting brass mill, brass foundry, and brass ingot maker industry segments and demonstrating that ingot makers have far higher zinc content in baghouse dust than either brass foundries or brass mills)

²² See 42 U.S.C. § 7412(k)(3)(B)(ii) and § 7412(c)(3)

²³ See 42 U.S.C. § 7412(d)(1)

individual SIC codes. The subsequent listings generally reflected categories defined by single SIC codes.²⁴ EPA listed secondary nonferrous metals processing as an area source category on June 26, 2002, because of the level of emissions of arsenic, chromium, lead, manganese, and nickel.²⁵ EPA's listing decision was made on the basis of the emissions contribution of facilities in SIC Code 3341, which includes ingot making, in the 1990 TRI Inventory.²⁶ SIC code 3351, the relevant code for the brass mill industry, was not included in this listing even though EPA had data on melting emissions from facilities in SIC code 3351.²⁷

EPA's description of the source category in the listing decision demonstrates EPA's accurate belief that SIC 3341 was focused on facilities engaged in the refining of metals. EPA focused the discussion on several different refining processes "used to separate desired metals from other less or undesirable materials."²⁸ Thus, when EPA targeted SIC code 3341 in its source category listing, the agency was not targeting emissions from brass mills to meet its obligation to list and regulate sources of 90 percent of emissions of the 30 identified HAPs. Indeed, EPA did not target brass mills and other SIC code 3351 facilities because HAP emissions from these sources were comparatively small.²⁹ For example, arsenic emissions from SIC code 3341 facilities constituted 0.34% of total arsenic emissions, while SIC code 3351 was not even listed as a source of arsenic emissions. Similarly, for chromium, SIC code 3341 facilities were identified as contributing 0.22% to the total inventory, while SIC code 3351 facilities were ranked far below at 0.09%. SIC code 3351 facilities similarly ranked far below SIC code 3341 facilities with respect to emissions of lead, manganese, and nickel.

²⁴ See National Air Toxics Program: The Integrated Urban Strategy, 64 Fed. Reg. 38706, 38720 (July 19, 1999) (noting that source category listings primarily represent single SIC codes).

²⁵ 67 Fed. Reg. 43112 (June 26, 2002)

²⁶ See Memorandum from Barbara Driscoll to Urban Strategy Docket, Expanded Description of Source Categories Listed in June 2002 for Future Regulatory Development (November 18, 2002) (docket # EPA-HQ-OAR-2002-0036-0051); See also, 1990 Emissions Inventory of Forty Potential Section 112(k) Pollutants, Supporting Data for EPA's Section 112(k) Regulatory Strategy, Final Report (May 21, 1999), p.1-8, 8-15, and C-86-87 (noting that TRI data was extracted using SIC codes for source categories in Appendix C, which clarifies that secondary nonferrous metals was listed based on SIC 3341 alone) (relevant excerpts included as Exhibit L, complete documents available at <http://www.epa.gov/ttnatw01/urban/112kfacs.html>)

²⁷ See Exhibit M, 1990 Emissions Inventory of Forty Potential Section 112(k) Pollutants, Supporting Data for EPA's Section 112(k) Regulatory Strategy, Final Report, p. C-28 (May 21, 1999)

²⁸ See Memorandum from Barbara Driscoll to Urban Strategy Docket, Expanded Description of Source Categories Listed in June 2002 for Future Regulatory Development, p 29. (November 18, 2002) (docket # EPA-HQ-OAR-2002-0036-0051)

²⁹ See 1990 Emissions Inventory of Forty Potential Section 112(k) Pollutants, Supporting Data for EPA's Section 112(k) Regulatory Strategy: Final Report (May 21, 1999)

Given that operations under SIC code 3351 were not ranked high enough to warrant listing under Section 112(c), EPA cannot now subject these facilities to the NESHAP merely because it believes their operations to be similar. Put simply, even if the operations were similar (which they are not, given that Mueller Brass conducts minimal refining and creates more complex finished products), EPA was not targeting similar operations through its listing decisions, it was targeting reported emissions. Since EPA did not need SIC code 3351 operations to meet its statutory obligations, the agency did not list the source category – and, therefore, did not address brass mills and other SIC code 3351 facilities in the NESHAP rulemaking.³⁰

EPA has repeatedly stated in various NESHAPs that it intended to regulate only source categories (and specific emission sources within the facilities) that contributed to the emissions inventory that drove the listing decision. For example, in the Metal Plating and Polishing NESHAP, EPA stated in the final rule that it was excluding repair and maintenance operations because emissions from these operations “were not part of the source category in the inventory.”³¹ In denying an exemption from the same rule, EPA stated that the commenter had “failed to demonstrate that emissions from such tanks were not included as part of EPA’s inventory analysis.”³² Numerous other rules contain similar language demonstrating that inclusion in the source category inventory is a condition precedent to regulation under a corresponding NESHAP.³³

³⁰ When EPA has expanded the scope of a categorical listing to add similar operations from a different SIC code, it has done so through a formal amendment of the source category. For example, EPA amended the ferroalloys source category to include silicon metal and calcium carbide producers that reported under different SIC codes and were not included in the original listing. EPA has never amended a source category to include emissions not elsewhere included in the 1990 emissions inventory. See Revision of Source Category List for Standards Under Section 112(k) of the Clean Air Act; and National Emission Standards for Hazardous Air Pollutants for Area Sources: Ferroalloys Production Facilities, 73 Fed. Reg. 53163, 53166 (Sept. 15, 2008).

³¹ National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Plating and Polishing Operations, 73 Fed. Reg. 37728, 37733 (June 1, 2008).

³² *Id.* at 37734.

³³ See National Emission Standards for Hazardous Air Pollutants for Area Sources: Electric Arc Furnace Steelmaking Facilities, 72 Fed. Reg. 74088, 74105 (Dec. 28, 2007) (noting that AOD emissions were properly included in the final rule because such emissions were included within the 1990 emissions inventory); National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines, 75 Fed. Reg. 51570, 51575 (Aug. 20, 2010) (stating that existing stationary emergency engines located at residential, commercial, and institutional facilities were not part of the emissions inventory and category listing); National Emission Standards for Hazardous Air Pollutants: Area Source Standards for Aluminum, Copper, and Other Nonferrous Foundries, 74 Fed. Reg. 30366, 30375 (June 25, 2009) (noting that foundries

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Similarly, in the Miscellaneous Surface Coating NESHAP, commenters argued that EPA was without authority to regulate metal parts and products because only plastic parts and products were part of the source category listing.³⁴ In response, EPA did not dispute that it could not regulate operations not within the source category listing, but demonstrated that metal parts and products were in fact within the original source category listing as part of the Final Urban Air Toxics Strategy document. In contrast, in the case of secondary nonferrous metals, the Urban Air Toxics Strategy document indicates that the source category was in fact limited to SIC code 3341.³⁵ SIC code 3341 targets, among other industries, brass and bronze ingot makers. It does not include copper rolling and drawing facilities with integrated melting operations.

Accordingly, because brass mills were not included in the source category listing, it is evident and consistent with the agency's position in multiple other NESHAPs that EPA did not intend to regulate them under the Nonferrous Metals Processing NESHAP.

2. **EPA's rule development documents demonstrate a desire only to regulate ingot makers**

The rulemaking record demonstrates that EPA technical staff were focused exclusively upon brass and bronze ingot makers and did not intend to include brass mills within the scope of the Secondary Nonferrous Metals NESHAP.

EPA characterized the scope of the secondary nonferrous metals industry early in the rulemaking process in an "industry characterization" document prepared by EPA consultants.³⁶ The process description and focus on the refining of metals (including smelting, refining, and chemical processes) and the creation of simple shapes cast from molds demonstrates that EPA was targeting ingot makers, and not brass mills. The documents relied upon by EPA contractors also demonstrate that EPA was targeting segments of the secondary copper industry that conducted substantial refining of metal.³⁷ The U.S. EPA's Office of Enforcement and Compliance Assistance sector notebook on secondary nonferrous metals also

melting predominantly iron and steel were not part of the source category because they reported to TRI under different SIC codes).

³⁴ See National Emission Standards for Hazardous Air Pollutants: Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources, 73 Fed. Reg. 1738, 1750 (January 9, 2008)

³⁵ See 1990 Emissions Inventory Final Report at 8-15, C-86

³⁶ See memorandum from Alton Peters and Jeff Coburn, RTI, to Iliam Rosario, EPA, entitled "Industry Characterization for Secondary Non-Ferrous Metals Area Source Category" (April 13, 2004) (docket # EPA-HQ-OAR-2006-0940-0026)

³⁷ See National Center for Manufacturing Sciences. Secondary Smelting of Nonferrous Metals: Impacts, Risks and Regulations, available at <http://ecm.ncms.org/ERI/new/IRRsecsmelt.htm>.

characterizes secondary copper processing as including pyrometallurgical scrap pretreatment and smelting/refining.³⁸ Neither of these processes are conducted at brass mills. EPA's primary concern with emissions associated with refining of secondary scrap (by ingot makers) is further demonstrated by communications between industry and EPA during the rule development process.³⁹

EPA's focus on the more polluting segments in the secondary copper industry that were actually listed as source categories under the Urban Air Toxics Strategy is further demonstrated throughout the industry characterization document. EPA notes that it reviewed the 1999 TRI inventory and additional sources to identify secondary nonferrous metals processing facilities. Brass mills were not included on the list of 110 facilities in the industry.

The Information Collection Request ("ICR") conducted in support of the rule also demonstrates that EPA did not contemplate including brass mills within the scope of the NESHAP. After initially determining in the industry characterization process that 110 facilities were engaged in secondary nonferrous metals production, EPA mailed the ICR to 98 facilities (per OMB approval). No brass mills received the ICR, despite EPA's demonstrated awareness of the industry.

EPA's supplemental ICR guidance further demonstrates EPA's regulatory intent with regard to the scope of the rule.⁴⁰ In this questionnaire, EPA states:

If your facility was never classified as SIC code 3341, enter 'never classified under SIC code 3341.'" *You are finished and do not need to complete the questionnaire.*⁴¹

Because brass mills, unlike brass and bronze ingot makers, were never classified under SIC code 3341 and instead were properly classified under SIC code 3351, it is clear that EPA did not contemplate the inclusion of brass mills.

EPA's failure to address remelters in the rulemaking process is likely confirmed by its refinement of the source category description during the rule development process.

³⁸ See EPA Office of Compliance Sector Notebook Project, Profile of Nonferrous Metals Industry (September 1995)

³⁹ See letter from John Bullock to Alton Peters, stating "You (or Iliam) described the agency's concerns with melting furnaces as being primarily with the type of flux used and the level of contamination." (January 12, 2005) (docket # EPA-HQ-OAR-2006-0940-0007)

⁴⁰ See Supplemental Guidance for Brass and Bronze Ingot Makers and Other Secondary Copper Remelting Processors (EPA-HQ-OAR-2006-0940-0023)

⁴¹ *Id.*

Whereas EPA in its original industry characterization document defined the secondary nonferrous metals processing area source category as being comprised of sources “engaged in the recovery of nonferrous metals and alloys from *new and used* scrap,” industry raised concerns about the rule’s impact on facilities that use relatively pure scrap feeds and conduct little or no refining.⁴² In response to these concerns, EPA ultimately proposed and promulgated a rule that applied only to secondary brass and bronze ingot makers that use post-consumer scrap. Presumably, EPA further limited the rule to ingot makers because of its understanding that some remelters used small proportions of post-consumer scrap that were nonetheless of high purity and did not require refining, and would thus be inappropriate for regulation.⁴³

Based on the ICR survey of the entire universe of potentially regulated sources, EPA determined that there were only 10 affected sources in the entire secondary nonferrous processing industry, of which five were brass and bronze ingot makers.⁴⁴ The remaining sources were secondary magnesium or secondary zinc processors. EPA reiterated in both the proposal and the final rule that 10 facilities comprised the entire source category.⁴⁵ Indeed, EPA relied upon these determinations in conducting its assessment of the rule’s compliance with the Regulatory Flexibility Act, the Paperwork Reduction Act, and other statutes.⁴⁶ If brass mills were included, EPA’s statements regarding the source category would be grossly inaccurate, as numerous other facilities – approximately 44 facilities in 21 states – also would be subject to the

⁴² See, memorandum from Alton Peters and Mike Laney to Iliam Rosario, re: Secondary Nonferrous Metals Area Source Standards Development Kick-Off Meeting with Trade Associations and Industry Representatives-Meeting Minutes (noting that questions were raised about the applicability of the rule to processes in which a facility remelts its own scrap or accepts direct returns from its own customers and noting that such issues will be further considered during regulatory development process) (February 7, 2005) (EPA-HQ-OAR-2006-0940-0006); see also, letter from John Bullock to Alton Peters outlining differences between facilities that use pure scrap feeds and those that conduct refining in the secondary precious metals industry (January 12, 2005) (EPA-HQ-OAR-2006-0940-0007)

⁴³ See Exhibit C, at 4, 8-9 (noting that brass and bronze makers use new scrap and some high grade old scrap such as No. 1 scrap, which is defined as scrap with greater than 99% copper content by weight)

⁴⁴ See memorandum from Alton Peters to Susan Fairchild, re: Secondary Nonferrous Metals-Facility Emissions Estimates (August 15, 2007) (EPA-HQ-OAR-2006-0940-0020); see also, memorandum from Alton Peters to Susan Fairchild, re: secondary nonferrous metals—ICR Tracking (August 16, 2007) (EPA-HQ-OAR-2006-0940-0021).

⁴⁵ See 72 Fed. Reg. 53838, 23847 (September 20, 2007) (stating “therefore there are 10 facilities in this area source category”); see also 72 Fed. Reg. 73180, 73184 (December 26, 2007)

⁴⁶ See 72 Fed. Reg. 73180, 73195

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rule. It strains credulity to believe that EPA's estimate of the number of affected facilities could be off by over 400%.⁴⁷


D. EPA Cannot Expand The Scope Of The NESHAP To Cover An Industry Sector Not Encompassed Within The Rulemaking Record Or Given Fair Notice Of The Potential Applicability Of The Rule

Having failed to include brass mills within the rulemaking record, including collecting no data from this distinct industry segment, it is fundamentally unfair for EPA now to expand the scope of the NESHAP to cover such facilities. Given the agency's extensive history in separately regulating the various segments of the secondary copper industry, and the lack of any meaningful discussion of brass mills during the rulemaking process, Mueller Brass and other brass mills did not have fair notice of the potential applicability of the rule to their industry sector. To now attempt to apply the NESHAP to brass mills is not only unfair but contrary to the legal requirements of notice and comment rulemaking. Such a novel interpretation conflicts with EPA's own rulemaking record and would create a "grounds arising after" challenge to the regulation under the CAA's judicial review provisions.

III. CONCLUSION

For the reasons noted above, Mueller Brass requests that EPA clarify that the Secondary Nonferrous Metals Processing Rule is inapplicable to brass and bronze mills. We would like to meet with you or Headquarters staff in the near future to discuss these issues further. If you have any questions please contact John Wittenborn, counsel to Mueller Brass, at 202.342.8514 or JWittenborn@KelleyDrye.com.

Respectfully submitted,



John L. Wittenborn

⁴⁷ See The U.S. Copper-base Scrap Industry and Its By-Products, 2009, Copper Development Association, at 23, 82, available at http://www.copper.org/publications/pub_list/pdf/scrap_report.pdf



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OCT 24 2012

REPLY TO THE ATTENTION OF:

Mr. John L. Wittenborn
Kelley Drye & Warren LLP
Washington Harbour, Suite 400
3050 K Street, NW
Washington, D.C. 20007-5108

Re: Request for Applicability Determination for Secondary Nonferrous Metals
NESHAP

Dear Mr. Wittenborn:

Thank you for your letter dated March 25, 2011 to the U.S. Environmental Protection Agency, requesting an applicability determination related to the National Emission Standards for Hazardous Air Pollutants for Secondary Nonferrous Metals Processing Area Sources, 40 CFR Part 63, Subpart TTTTTT (Secondary Nonferrous Processing NESHAP or Subpart TTTTTT). Specifically, you are asking for a determination as to whether the Secondary Nonferrous Processing NESHAP applies to the Mueller Brass Co. facility, located in Belding, Michigan (Mueller).

EPA has reviewed the information you submitted and all the supporting documentation in the EPA docket. We have also had your request reviewed by EPA's Office of Enforcement and Compliance Assurance (OECA) and EPA's Office of Air Quality Planning and Standards (OAQPS). Based on our review of the information, EPA has concluded that the Secondary Nonferrous Processing NESHAP does not apply to Mueller, as summarized below.

The Secondary Nonferrous Processing NESHAP applies to a secondary nonferrous metals processing facility that is an area source of hazardous air pollutants. A "secondary nonferrous metals processing facility" is defined at 40 CFR § 63.11472 as:

...a brass and bronze ingot making, secondary magnesium processing, or secondary zinc processing plant that uses furnace melting operations to melt post-consumer nonferrous metal scrap to make products including bars, ingots, blocks, or metal powders.